BEST AVAILABLE COPY

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. VIEWING GOVERNMENT CONTRACTS AS MERE GAMBLES THAT THE GOVERNMENT WILL NOT RENEGE IS FLATLY AT ODDS WITH THE COURT'S TAKINGS AND DUE PROCESS JURISPRUDENCE, WHICH PROTECTS THE REASONABLE, INVESTMENT-BACKED EXPECTATIONS OF PRIVATE PARTIES EVEN IN THE ABSENCE OF AN EXPRESS PROMISE OR CONTRACTUAL RELATIONSHIP ... 7

II. THE SOVEREIGN ACTS AND UNMISTAKABILITY DOCTRINES ARE IRRELEVANT TO RESPONDENTS' FIFTH AMENDMENT CLAIMS, AS IS THE GOVERNMENT'S ARGUMENT THAT THE AGENCY LACKED CONGRESSIONAL AUTHORIZATION 16

(A) Overview of the Sovereign Acts and Unmistakability Doctrines 16

(B) Inapplicability of the Doctrines to the Fifth Amendment 19

(C) Congressional Authorization of Agency Action 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: **Pages**

Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) 18
Amino Bros. Co. v. United States, 372 F.2d 485 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) 17
Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) 15
Bennis v. Michigan, 1996 WL 88269 (No. 84-8729, Mar. 4, 1996) 12
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 22-23
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 20
Correale v. United States, 479 F.2d 944 (1st Cir. 1973) ... 19
Cox v. Louisiana, 379 U.S. 559 (1959) 13-14
Energy Reserves Group, Inc. v. Kansas Power & LightCo., 459 U.S. 400 (1983) 24
Exxon v. Eagerton, 462 U.S. 176 (1983) 18
Federal Crop Ins. Corp. v. Merrill, 332 U.S. 384 (1947) .. 26
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 11, 26-27
Fleming v. Nestor, 363 U.S. 603 (1959) 23-24
Geisser v. United States, 513 F.2d 862 (5th Cir. 1975) 27
Heckler v. Community Health Services, 467 U.S. 51 (1984) 14-15
Hercules v. United States, 1996 WL 88267 (No. 94-818, Mar. 4, 1996) 17
Horowitz v. United States, 267 U.S. 458 (1925) 18
Hughes Communications Galaxy, Inc. v. United States, 26 Ct. Cl. 123 (1992) 23
Johnson v. United States, 318 U.S. 189 (1943) 14
Jones v. United States, 1 Ct. Cl. 383 (1865) 18
Kaiser Aetna v. United States, 444 U.S. 164 (1979) .. *passim*

Cases (continued): **Pages**

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 24
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 20
Lynch v. United States, 292 U.S. 571 (1934) 7
Mabry v. Johnson, 467 U.S. 504 (1984) 12
Manigault v. Springs, 199 U.S. 473 (1905) 16
Miller v. Schoene, 276 U.S. 272 (1928) 12
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 14-15
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 8
North American Commercial Co. v. United States, 171 U.S. 110 (1898) 16
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) 19-20
OPM v. Richmond, 496 U.S. 414 (1990) 26
Palermo v. Warden, 545 F.2d 286 (2d Cir. 1976), *cert. denied*, 431 U.S. 911 (1977) 27
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 8
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 20
Perry v. United States, 294 U.S. 330 (1935) 7, 19
Raley v. Ohio, 360 U.S. 423 (1959) 13-14
Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 18
Ruchelshaus v. Monsanto Co., 467 U.S. 986 (1984) 11-12, 26
Santobello v. New York, 404 U.S. 257 (1971) ..... *passim*
St. Regis Paper Co. v. United States, 368 U.S. 229 (1961) 15
Stahel v. United States, 78 F. Supp. 800 (Ct. Cl. 1948) . 21-22
Transcapital Financial Corp. v. OTS, 44 F.3d 1023 (D.C. Cir. 1995) 21
Transohio Savings Bank v. OTS, 967 F.2d 598 (D.C. Cir. 1992) 8, 16, 21

Cases (continued): **Pages**

United States v. Cherokee Nation, 480 U.S. 700 (1987) 22-23
United States v. Harvey, 79 F.2d 294 (4th Cir. 1986) .. 12-13
United States v. Pennsylvania Industrial Chem. Corp.,
411 U.S. 655 (1973) 14
United States v. Will, 449 U.S. 200, 222 (1980) 16
Wah Chang Corp. v. United States, 282 F.2d 728
(Ct. Cl. 1960) 22
Winstar Corp. v. United States, 25 Ct. Cl. 541 (1992) 23
Winstar Corp. v. United States,
64 F.3d 1531 (Fed. Cir. 1995) 17
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 26

Statutes

Financial Institutions Reform, Recovery, and Enforcement
Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 1

Other Authorities

Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) 12

INTEREST OF *AMICI CURIAE*

Amici AmBase Corporation ("AmBase") and Carteret Bancorp, Inc. ("Carteret Bancorp") are banking institutions that entered into agreements with the government that are similar to those at issue in the case being heard by this Court. Like respondents, *amici* have suffered financial losses as the result of the government's failure to fulfill its contractual agreement to permit the continued use of goodwill as regulatory capital. *Amici* have filed a complaint in the United States Court of Federal Claims, No. 93-531C. The facts involved in *amici*'s suit parallel those involved here, and the questions of law at issue in the present case bear directly on the disposition of *amici*'s claims. However, *amici* file this brief not to echo the contract law arguments of respondents, but to remind the Court of the limits that our constitutional jurisprudence -- and particularly the Due Process and Takings Clauses -- places upon the government's power to impose the entire risk of a change in law such as that wrought by FIRREA upon respondents and upon parties similarly situated. In light of its ruling on the contract claims, the Court of Federal Claims and the Federal Circuit did not reach any claim that plaintiffs are entitled to just compensation for a taking of the monies they had invested in the reasonable expectation that they could count supervisory goodwill in calculating regulatory capital, or for the deprivation of that property without due process of law. Only a decision by this Court to uphold the judgment below could obviate the need for the lower courts, and ultimately this Court, to reach those claims.*

Amici's action arises out of the federal government's abrogation of contractual promises made by federal banking agencies directly to *amici* and to their former subsidiary Carteret Savings Bank, FA ("Carteret"), which was seized by federal regulators in December 1992, and the government's destruction

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* Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

of AmBase's reasonable, investment-backed expectations -- based upon governmental promises and inducements -- in purchasing and infusing additional capital into Carteret. The government's promises were made in connection with Carteret's acquisition of five insolvent thrifts, and also in connection with AmBase's acquisition in 1988 of Carteret and its holding company Carteret Bancorp.

In those transactions the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC") agreed that Carteret would be permitted to include in the calculation of its regulatory capital the "supervisory goodwill" created in conjunction with the 1982 and 1986 acquisitions of insolvent thrifts, to be amortized over a period of up to forty years. These commitments were critical to Carteret's agreement to acquire (to the government's great fiscal benefit) five failing thrifts with aggregate negative tangible capital in excess of $200 million. The promises by FHLBB and FSLIC, and the expectation thereby induced by the federal government that the specified regulatory capital treatment would be honored throughout the agreed amortization period, were also essential to AmBase's agreement to acquire Carteret (through Carteret Bancorp) in 1988 at a cost of approximately $266 million, and to commit to the government that AmBase would, under certain circumstances, infuse up to $50 million in additional capital into Carteret (which it did), and would guarantee the value of a Carteret subsidiary. In entering into these transactions the government created, and understood it created, investment-backed expectations by Carteret, Carteret Bancorp and AmBase that the promised regulatory capital treatment would remain in effect throughout the period agreed upon. The government's understanding was reflected not only in the numerous representations made by its agents, but also in the fact that it never required Carteret or AmBase to disclose in their Securities and Exchange Commission ("SEC") filings the considerable risk of insolvency that would have existed as a

result of the government's alleged freedom to change the regulatory requirements for treatment of supervisory goodwill without providing any compensation to the thrifts for their lost investment.[1] In reality, neither the government nor AmBase and Carteret perceived any such risk in the acquisition of the failing thrifts -- because the government had assumed financial responsibility for future regulatory changes that would render it unable to perform its contractual obligations.

AmBase, Carteret Bancorp and Carteret fully performed their obligations under the parties' agreements, which saved the government millions of dollars that it would itself otherwise have had to invest to assist the failing thrifts or to facilitate their merger with healthy thrifts. Although FHLBB and FSLIC and their successors received the full benefits of their contractual bargains, *amici*'s contractual and property rights have been completely abrogated and confiscated by the government's conduct, purportedly pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 *et seq.* ("FIRREA"). Under FIRREA as interpreted and applied by the government, Carteret could no longer count its supervisory goodwill in regulatory capital, and without this supervisory goodwill could not meet the FIRREA regulatory capital requirements. Because of Carteret's inability to meet the new capital requirements absent the inclusion of supervisory goodwill, federal regulators seized Carteret on December 4, 1992. As a result of the seizure, AmBase has been deprived of its entire cash investment in Carteret of over $328 million, and the government has been enriched by the millions of dollars in capital AmBase infused directly into that institution.

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[1] Carteret and most of the other banks that acquired failing thrifts during the early 1980s were publicly traded companies that filed annual 10K statements with the SEC, as well as prospectuses. In order to protect public investors, the SEC requires full disclosure of all material facts potentially affecting a company's ability to continue its operations, including the ability to meet regulatory capital requirements.

In their complaint filed in the Court of Claims, *amici* allege that the Government's repudiation and abrogation of its commitments to AmBase, Carteret Bancorp and Carteret -- purportedly pursuant to the policy changes enacted in FIRREA -- constitute a breach of the parties' agreements, a frustration of the purpose of those agreements, and an uncompensated taking of *amici*'s property in violation of the Just Compensation and Due Process Clauses of the Fifth Amendment. *Amici* seek both declaratory relief and a monetary award of damages, restitution, or just compensation.

SUMMARY OF ARGUMENT

Amici adopt the position and arguments of respondents with respect to the breach of contract claims. However, in this brief, *amici* argue that, even if this Court were to conclude that the contracts at issue in this case failed in sufficiently unmistakable terms to shift to the Government the risk of future regulatory change as to the treatment of supervisory goodwill;[2] that the

[2]The Government actually argues that the relevant question is whether the agreements "unmistakably grant[ed] respondents the right, despite future legislative changes, to continue to count goodwill as capital for purposes of meeting federal capital requirements." Pet. Br. at 22. However, as discussed in Point II(A) *infra*, since a future Congress's power to regulate cannot be restricted at all, let alone by "unmistakable" language, through anything short of a constitutional amendment, the proper question is whether the thrift agreements unmistakably *allocate the risk* of regulatory change, and the resulting costs, to the Government, *not* whether the agreements guarantee the thrifts the right to continued use of supervisory goodwill regardless of any intervening changes in the law. Consequently, much of the Government's brief -- which sets out to demonstrate that the agreements did not guarantee the thrifts the right to count supervisory goodwill as capital despite subsequent changes in the law, *see* Pet. Br. at 22-36 -- is simply beside the point, since neither respondents nor *amici* contend that the Government could have granted them such a right.

agencies involved lacked authority to enter the agreements;[3] and that FIRREA constituted a "public and general" sovereign act barring recovery for abrogation of the agreements -- and even if the same reasoning were to compel a like conclusion with respect to *amici*[4] -- such findings would have no bearing on the merits of respondents' or *amici*'s Fifth Amendment claims.[5] This would be so even if it were conceded that the thrifts' property interest for purposes of the Takings and Due Process Clauses arises from the same contractual rights now at issue, because takings and due process jurisprudence protects those who justifiably rely on government promises or representations, whether express or implied, particularly when such reliance takes the form of investment-backed expectations, and especially when the government's promises and representations were intended to induce the very investments that the government later takes or destroys.

In the context of interpreting contracts and resolving federal common-law or statutory claims against the government for

[3] Again, because not even Congress, much less an agency, can bind a future legislature to a certain regulatory course, the government is knocking down a straw man when it argues, *see* Pet. Br. at 38, that the agencies in this case lacked congressional authorization to guarantee the thrifts that capital requirements would not be changed. However, even if the agencies had purported to limit Congress's regulatory authority in this way (which they could not do) or had induced the thrifts' financial investment without congressional authorization, this would not defeat the Fifth Amendment claim of *amici*. *See* Point II(C) *infra*.

[4]Of course, *amici*'s claims of breach might well be stronger than that of respondents, to the extent that the evidence *amici* present at trial establishes that the government agencies unmistakably assumed, vis-a-vis *amici*, the risk of future changes in capital requirements.

[5]In its Reply Brief in support of its Petition for Writ of *Certiorari*, p.11 n.6, the government concedes its "sovereign acts defense 'does not defeat [the thrifts'] claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief.'"

breach, both the unmistakability and sovereign acts doctrines rest upon a "dual capacity" notion that separates government in its role as contractor from government in its role as sovereign and regulator in order to ensure that the government fares no worse than do private contractors with respect to federal regulatory changes, and in order to avoid unduly penalizing or taxing the government -- and thus the public treasury -- whenever government regulates for the public good in ways that have the incidental effect of frustrating public or private contractual obligations.

By contrast, the Fifth Amendment protects persons whenever the government has induced reasonable expectations and then exercised its sovereign power, whether through "public and general" acts or otherwise, in a way that frustrates those expectations and puts to public use the investment of money or other private property that the government has deliberately induced a party to make. This is so regardless of whether the governmental agency making the underlying commitment in fact has the full and unambiguous legislative authority to do so, or has merely held itself out as having that authority in a manner that reasonably induced the private reliance at issue.

Therefore, this Court should not apply the unmistakability or sovereign acts doctrines, or decide the issue of agency authorization, in a way that would foreclose or in any way limit the separate Fifth Amendment claims of respondents and of *amici*. At the very least, even if this Court were to reverse the determinations of the Court of Claims and Federal Circuit as to the breach of contract issue, it should remand for disposition of the Fifth Amendment issues in this case. But, because it is apparent from even the limited record developed to date that *amici* gave the government a considerable financial benefit in direct response to the government's promises, accepting the government's contract arguments here would needlessly require the lower courts in the first instance, and eventually this Court itself, to rule on *amici*'s due process and just compensation

claims, which would not only survive but should -- for reasons to be developed here -- succeed on the merits.

ARGUMENT

I. VIEWING GOVERNMENT CONTRACTS AS MERE GAMBLES THAT THE GOVERNMENT WILL NOT RENEGE IS FLATLY AT ODDS WITH THIS COURT'S TAKINGS AND DUE PROCESS JURISPRUDENCE, WHICH PROTECTS THE REASONABLE, INVESTMENT-BACKED EXPECTATIONS OF PRIVATE PARTIES EVEN IN THE ABSENCE OF AN EXPRESS PROMISE OR CONTRACTUAL RELATIONSHIP.

Takings and due process doctrine holds that government-induced expectations created through agreements with particular parties are legally protected interests, and that private parties are entitled to be restored to the *status quo ante* -- even if not to specific performance or to contract-based, expectancy damages -- when these expectations are frustrated by the government's failure to keep its promises. It is simply not true that every transaction with the Government amounts to little more than a toss of the dice -- a gamble that the Government will not change the applicable law in ways that render the contract economically senseless. Not only is this position -- that private parties contract with the Government at their own peril -- at odds with well-established government contract doctrine, as exemplified by *Perry v. United States*, 294 U.S. 330 (1935), and *Lynch v. United States*, 292 U.S. 571 (1934), it also runs counter to strong currents in takings and due process jurisprudence which protect even those reasonable, investment-backed expectations that, although government-induced, are not created through an iron-clad, airtight contractual arrangement.

In the takings context, the Supreme Court has held unequivocally that "investment-backed expectations" are the essence of private property rights, *see, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and that these expectations, when formed under explicit or fairly implied government assurances, merit full constitutional protection. Where the government has induced reasonable, investment-backed expectations in this manner, it must provide just compensation when it defeats those expectations by those subsequent changes in its policy, however constitutional such changes might be on their face, that have the effect of confiscating for the public's benefit the property that the government has induced a private party to invest.[6]

For example, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the question presented was whether the United States was free, without paying just compensation, to require the owner of a certain Kuapa Pond that had been dredged, converted to a marina, and connected to the navigable waters of the United States, to afford access thereto to members of the public. The Court held that the federal government's creation of a public right of access, through an otherwise constitutional exercise of

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[6] The fact that private property has been relinquished voluntarily in reliance on a government promise or other inducement does not mean that this property has not been "taken." *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-37 (1987) (finding a taking where a landowner had voluntarily given up a property right in exchange for development permission). In the present case, the thrifts and their investors gave multi-million-dollar-value consideration to the government in exchange for the government's promises and in reliance on the government's representations regarding the use of supervisory goodwill to meet regulatory capital requirements. That money relieved the federal thrift regulators of having to spend equivalent sums from the U.S. Treasury to accomplish the takeover of failing thrifts. *See Transohio Savings Bank v. OTS*, 967 F.2d 598, 618 (D.C. Cir. 1992) (conceding that the thrift "agencies had no power to compel Transohio to purchase the insolvent thrifts," and that "[b]y absorbing the insolvent thrifts, Transohio gave the agencies something they wanted").

its pervasive power to regulate in navigable waters, was -- absent just compensation -- a taking in violation of the Fifth Amendment. The fact that the government agency, the U.S. Army Corps of Engineers, had awarded a dredging permit and allowed this costly project to go forward to completion before it demanded that free public access be provided, was critical to the Court's judgment. The Court explained:

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation [in the adjacent waters], or could have conditioned its approval of the dredging on [the owner's] agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what [the owners] now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States ..., it can lead to the fruition of a number of expectancies embodied in the concept of "property" -- expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over management of the landowner's property. *Id.* at 179 (citations omitted).

Like the instant case and the other thrift acquisition cases now pending in the federal courts, *Kaiser Aetna* involved an area pervasively regulated by the federal government: under the Commerce Clause, the long-established rule is that all waters connected to a navigable waterway are automatically subject to the navigable servitude of the United States and to the comprehensive regulations adopted by federal authorities. But *un*like the thrift acquisition cases, *Kaiser Aetna* did not involve a specific government promise for which the private party to whom the promise was made had given consideration, and which had induced that party to invest financial resources in a project,

and where the government obtained direct financial benefit from the investment. Indeed, the Supreme Court concluded that promissory "estoppel," in the sense that concept is used in the law of contracts, was neither a necessary nor a sufficient basis on which to hold the government liable for payment of just compensation. Moreover, in *Kaiser Aetna* there was no explicit misrepresentation, only a failure to disabuse a private party of the impression it already held. Yet this implicit misrepresentation was held sufficient to solidify the owner's expectation that it would retain the right to exclude.

Given *Kaiser Aetna*, the theory that contracting with the government involves a necessary risk of noncompensable government violation of its bilateral commitments cannot be squared with Supreme Court takings jurisprudence. If a property owner is protected on the basis of government-induced, investment-backed expectations even where there is no explicit contract, surely it cannot be the case that the property owner is entitled to *less* protection when the government's inducement comes in the form of an express agreement with the government intended to induce the financial investment of the private contracting party as well as of non-parties who will act in foreseeable reliance on the contract.

Consider a parallel to the savings and loan crisis that is the background in this case. The result in *Kaiser Aetna* would have been the same if the government had approached Kaiser Aetna and explained that Kuapa Pond should be developed into a marina to limit the flow of obstructing sediment into nearby navigable waters, but that the Corps of Engineers budget lacked the funds for the Corps to do the job itself, and that the government, in order to induce Aetna to dredge and develop and maintain the pond and thereby simultaneously accomplish the federal government's important public goal, would forbear taking the position that Kuapa Pond was a public navigable waterway and would thereby allow Aetna to develop a private marina to which it could, at its option, deny access or charge

admission fees. Under this scenario, it would be difficult to hold that Kaiser Aetna had gambled that Congress, through a general sovereign act, would not subsequently reach a different conclusion about the wisdom of such a project, and that Kaiser Aetna would therefore have been entitled to no restitution of the enormous assets it had been induced to commit and from which the public and the government had directly benefited, on the theory that the Corps of Engineers had no authority to bind the United States in the face of such subsequent congressional action. Because the Fifth Amendment Due Process and Takings Clauses are self-executing limits on Congress and the Executive alike, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987), there would simply be no way to reconcile *Kaiser Aetna* with such a view of how Congress might freely convert private property to public use.

This Court again stressed the role of the Takings Clause in protecting reasonable, investment-backed expectations in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). That case involved abrogation of Monsanto's governmentally-induced expectations that the trade secret data it submitted to the EPA in the course of seeking registration for a new pesticide would not be disclosed to others. The Court found these expectations "overwhelming," and held that they alone "dispose[] of the taking question." *Id.* at 1005:

> [T]he Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of the confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA ... were now to disclose trade-secret data ... EPA's actions would frustrate Monsanto's reasonable investment-backed expectations with respect to its control over the use and dissemination of the data it had submitted. *Id.* at 1011.

Thus, denial of reasonable, investment-backed expectations, so

as to devote private property to public use, was sufficient in and of itself in *Monsanto* to establish a taking that required payment of just compensation, and the Tucker Act was available as a remedy.[7]

Prevailing due process doctrine similarly would protect the thrifts, even in the absence of a breach of contract claim. This Court has emphasized on several occasions that the Due Process Clause protects the reasonable expectations of private parties who have relied on government promises or representations made directly to them. Indeed, the Court has held that even convicted criminals have expectation interests that are constitutionally protectable when they are reasonably formed in reliance on the honor of the government in keeping its promises. For example, when a defendant pleads guilty in reliance on a prosecutor's promise to that defendant, the Due Process Clause requires that the prosecutor either fulfill that promise or allow the defendant to withdraw his plea and be restored to the *status quo ante*. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971); *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *see also United States v. Harvey*, 79 F.2d 294, 300 (4th Cir. 1986) (holding that broken government promise which induced guilty plea

[7] Although compensation is due under the Takings Clause when property is taken for a public use, as it was in *Kaiser Aetna* and *Monsanto*, compensation is not necessarily due when property is simply *destroyed* for a public purpose, in an exercise of the government's police power. *See, e.g., Bennis v. Michigan*, 1996 WL 88269, at *3-*7 (No. 94-8729, Mar. 4, 1996) (upholding against takings and due process challenges the forfeiture of an automobile under Michigan's statutory abatement scheme); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (no compensation due when government ordered property owners to cut down cedar trees that were contaminating nearby apple orchards). *See generally* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (discussing the "harm" principle). However, in these cases, the government had not induced the plaintiffs to engage in the very conduct or activity later deemed to be a nuisance. Consequently, unlike respondents and *amici* in the present case, those plaintiffs could not invoke reliance on their reasonable, investment-backed expectations.

implicates due process in part because it undermines "honor of the government [and] public confidence in the fair administration of justice").

Santobello involved the revocation of a plea bargaining agreement. The prosecutor agreed, in exchange for the defendant's pleading guilty to a lesser included offense, to make no sentence recommendation. The defendant entered the plea as agreed. However, at a sentencing several months later, a new prosecutor, unaware of his predecessor's agreement, recommended the maximum sentence. Chief Justice Burger, writing for a unanimous Court, afforded constitutional protection to the personal expectations created in the defendant by his plea bargain with the state. Relying on considerations of equitable estoppel, the Court refused to permit the second prosecutor simply to assume a legal position contrary to the plea bargain negotiated by the original prosecutor. *See* 404 U.S. at 262. Because a criminal defendant who relies on government promises with respect to a plea bargain agreement risks the surrender of constitutional rights, the Court declared that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The government's duty to fulfill promises made during plea negotiations is so essential that even an inadvertent breach is not a defense. *See id.* at 262-63. Due process principles required the government either to keep its word, or to undo the deal and return the defendant to his original position as a remedy when the government reneged.[8]

[8] The protection of reasonable, government-induced expectations has also surfaced on numerous occasions in the due process doctrine of excusing those who misinterpret the law in reliance on government's representations to them, made to induce them to perform acts sought by the government. *See Raley v. Ohio*, 360 U.S. 423, 438-40 (1959) (barring the prosecution of defendants who had relied on the erroneous advice of a state legislative committee as to their right against self-incrimination); *Cox v. Louisiana*, 379

In *Heckler v. Community Health Services*, 467 U.S. 51 (1984), this Court observed that these takings and due process cases "seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Id.* at 61 n.12 (citing, *inter alia*, *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1980), and *Santobello v. New York*, 404 U.S. 257 (1971)). The *Heckler* Court further noted that "[t]his principle also underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Id.* (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)). In *Bell Aerospace*, this Court indicated that it is impermissible for an agency to impose monetary damages or fines on the basis of violation of a standard articulated for the first time in an adjudication, where a private party had relied in good faith on earlier, inconsistent agency decisions under which

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U.S. 559, 569-71 (1959) (barring the prosecution of defendants who had relied on erroneous instructions from a police chief regarding where protestors could stand outside a courthouse to avoid violating an anti-protesting statute). In *Raley*, the Court addressed the private individual's reasonable expectations, which were protected under the Due Process Clause, by concluding that "[a]fter the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the state -- convicting a citizen for exercising a privilege which the State had clearly told him was available to him." 360 U.S. at 425-26. *See also Johnson v. United States*, 318 U.S. 189 (1943) (holding, long before it was established that prosecutors may not in any event comment on a defendant's failure to take the witness stand, that a prosecutor could not comment on a defendant's invocation of the privilege against self-incrimination when he relied on the judge's erroneous statement that the defendant could invoke the privilege on cross-examination); *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655, 674 (1973) (holding that the defendant could not be prosecuted for violating an environmental statute prohibiting the discharge of pollutants into navigable rivers if the defendant had been misled by regulations of the Army Corp of Engineers).

the party's conduct was lawful. *See* 416 U.S. at 295. Under the *Bell Aeorospace* principle, the agency would be barred from enforcing against a particular party a substantive determination, made by an otherwise valid adjudicatory process, because justifiable reliance by that party on *earlier* agency statements taking an opposite view of the matter made it unfair to the particular party simply to enforce the new agency position as though it had always been in place.

In sum, justifiable reliance on government promises or representations, without more, can support recognition of a property right for purposes of both the Due Process Clause and the Just Compensation Clause. As Justice Black once wrote:

> Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (quoted with approval in *Heckler v. Community Health Services*, 467 U.S. at 61 n.13). Characterizing the process of contracting with the federal government as a fool's gamble cannot be reconciled with this venerable body of Fifth Amendment jurisprudence. "To say ... 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) (quoted in *Heckler v. Community Health Services*, 467 U.S. at 61 n.13). This principle should, of course, be even stronger when there is a formal government contract, as in this and other failing thrift acquisition cases, that is designed to induce and does induce a substantial investment, by both contracting parties and non-parties foreseeably relying on that contract, for the government's benefit.

II. THE SOVEREIGN ACTS AND UNMISTAKABILITY DOCTRINES ARE IRRELEVANT TO RESPONDENTS' FIFTH AMENDMENT CLAIMS, AS IS THE GOVERNMENT'S ARGUMENT THAT THE AGENCY LACKED CONGRESSIONAL AUTHORIZATION.

(A) Overview of the Sovereign Acts and Unmistakability Doctrines. Although the sovereign acts and unmistakability defenses are sometimes discussed separately, they are inextricably linked. Taken together, these doctrines provide that the government will not be held to have assumed the risk of "public and general" sovereign acts that incidentally frustrate its contracts with private parties unless those contracts "unmistakably" so provide.[9] Both the sovereign acts and the

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[9]The government misleadingly describes the sovereign acts doctrine as an absolute defense to a breach of contract claim whenever "a performance of a contract made by a government agency is rendered impossible by a subsequent federal statute or other action that is a public and general act." Pet. Br. at 44. In fact, the government may still be liable, even when it has acted in its sovereign capacity in a "public and general" way, if it assumed the risk of such intervening changes in law in the contract.

The government also misleads when it states that, under the unmistakability doctrine, "a contractual surrender of a sovereign power for the future should never be found without unmistakable language to that effect." Pet. Br. at 17. Although similar statements of the doctrine appear in other cases, *see, e.g., Transohio Savings Bank v. OTS*, 967 F.2d 598, 618-20 (D.C. Cir. 1992), the fact is that the government's power as a sovereign "cannot be contracted away," no matter how "unmistakable" the language in the contract might be. *See North American Commercial Co. v. United States*, 171 U.S. 110, 137 (1898). The Constitution does permit legislatures to enter into binding contracts and to create vested rights in contract and property that a subsequent legislature cannot impair, but, as the government itself concedes, "[a]t least with respect to the exercise of sovereign regulatory authority, a particular Congress ... cannot take actions that tie the hands of its successors." Pet. Br. at 38. *See also United States v. Will*, 449 U.S. 200, 222 (1980); *Manigault v. Springs*, 199 U.S. 473, 487 (1905).

unmistakability doctrines are hinged upon a conception of the government's "dual capacity" as both a sovereign and a participant in commerce -- a conception which holds that, in order to be effective, the government must ordinarily be free to act in the interests of the general welfare, unhampered by concerns over its contractual responsibilities to particular citizens.

These twin doctrines are thus designed to balance the government's contractual obligations against its obligations to the people it represents -- its duties as sovereign. To strike this balance, courts adopt the fiction that the government, when it enters into agreements, is simply another private contractor, having no more control over or relationship to the government in its role as sovereign than has any other private party. Since private parties, absent an agreement to the contrary, are not liable

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Consequently, rather than permitting restraints on the government's regulatory power, the unmistakability doctrine at best provides a special rule of interpretation, used in conjunction with the sovereign acts doctrine as applied to contracts between the government and private parties, for determining whether the government has assumed the risk of nonperformance due to its own public and general sovereign acts. *See Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl.), *cert. denied*, 389 U.S. 846 (1967) ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the sovereign act."); *see also Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995) (stating that, although the government could not be enjoined from exercising its sovereign power to change the relevant regulations, the government could be "compelled to pay for the results of its actions" if it had unmistakably assumed responsibility for the consequences of nonperformance due to such change). In a sense, the unmistakability doctrine for allocating the risk of regulatory changes that frustrate government contracts is analogous to the rule requiring clear indications in a contract that the government is waiving its sovereign immunity from suits to which it has not consented. *See Hercules v. United States*, 1996 WL 88267, at *4-*6 (No. 94-818, Mar. 4, 1996) (refusing to infer such a waiver -- and an obligation to indemnify private contractors -- from a provision in a government military contract requiring performance to specifications).

for costs resulting from future changes in law, the government similarly is not liable for sovereign acts that incidentally impair its contracts -- notwithstanding the fact that, in reality, the government (perhaps even the same agency) now abrogates the very contract into which it had entered. *See Horowitz v. United States*, 267 U.S. 458, 458 (1925) ("Though ... sovereign acts performed [by the government] for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."); *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865) (stating that "the United States ... are to be held liable only within the same limits that any other defendant would be in any other court").[10]

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[10] As courts have recognized, within the balance between government as market participant entering contracts and government as sovereign protector of the general public, there is a natural tension that, if left unattended, can tip the scales irretrievably against the private citizen. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (distinguishing between "States as market-participants and States as market regulators"). Because the risk is great that, under the guise of governing, the government might unfairly influence the commercial market to its own advantage, the sovereign acts defense is not without limits, but applies only when the government's legislative or executive acts are "public and general." *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). *Cf. Exxon v. Eagerton*, 462 U.S. 176, 192 (1983) (suggesting that the Court will scrutinize less closely statutes of general application that incidentally operate to impair contracts than statutes that are specifically directed at contract impairment); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 247 (1978) (striking down under the Contracts Clause a state law "nullif[ying] express terms of the company's contractual obligations" with the state). The danger under the dual capacity principle that the government will abuse its role as sovereign vis-a-vis its contractual obligations should lead this Court to question whether the government can properly be released from the agreements it made with particular thrifts merely because its sovereign acts of public policy -- even though aimed directly at those agreements -- are broader in scope than the simple renunciation of a specific contractual promise. *Amici* agree with respondents that the sovereign acts defense must require a greater level of "generality" than the mere fact that the statute purports to apply to all thrifts equally.

(B) Inapplicability of the Doctrines to the Fifth Amendment. Although the sovereign acts and unmistakability doctrines thus separate government as contractor from government as sovereign, at least where the government's sovereign acts are for the public good and are general in their aim and effect rather than targeted at particular contractual obligations, takings and due process jurisprudence reveals the significant extent to which the law protects reasonable, investment-backed expectations induced by the government, whether by express promise or by a course of conduct, from the effects of even the most public and general of sovereign acts.[11] Indeed, for purposes of the Fifth Amendment, it is the *very fact* that government *both* contracts (or promises) *and* enacts laws or regulations that often *makes* something a taking of private property for a public use, or without due process of law, rather than simply a sovereign act with indirect effects on private contracts. *See Perry v. United States*, 294 U.S. 330, 350-51 (1935) (distinguishing "the power of Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority" from "the power of Congress to alter or repudiate the substance of its own engagements"). Thus, it is apparent that the Fifth Amendment does *not* incorporate the dual capacity notion, discussed above, that treats the government, when it interferes (even through a public and general sovereign act) with performance of its contracts, as essentially a non-contracting party with no special duties or obligations under those contracts.

Compare, for example, those cases in which a party claims a Fifth Amendment violation when an exercise of governmental regulatory power frustrates a purely private agreement, *see, e.g.*, *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923) (rejecting takings claim in connection with a private

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[11] As noted earlier, the Government concedes that the sovereign acts doctrine does not defeat a takings claim. *See supra* note 5.

contract because "[f]rustration and appropriation are essentially different things"), with those cases in which a regulation frustrates an understanding *with the government, see, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Santobello v. New York*, 404 U.S. 257 (1971). In the former cases of contracts between private parties, the government can typically argue that it was merely making rules or enacting legislation in its sovereign capacity and should not be pecuniarily liable for their harmful consequences. There are many laws and government operations that have an injurious effect on, or even destroy, the value of contracts or other property but that are not considered takings or due process violations, largely because the expectations or investments of the plaintiff that are the basis of the property interest were not created or induced *by the government* to generate a public benefit. In such cases of consequential loss or injury resulting from lawful government action, the law generally affords no remedy unless that loss is severe enough effectively to reduce the property's value to zero. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 (1992) ("[T]he functional basis for permitting the government, by regulation, to affect property values without compensation -- that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' -- does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial use.") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). *Cf. Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 ((1986) (in a case not involving a contract with the government, the Court observed that "legislation readjusting rights and burdens" is "not unlawful solely because it upsets otherwise settled expectations," "even though the effect of the legislation is to impose a new duty or liability based on past acts").

In short, in analyzing takings and due process claims arising from the government's alleged failure to abide by its contractual obligations or even by its implied promises, courts have *not* adopted the principle, sometimes said to control mere contract claims, that agreements between the government and a private party should be given no greater status than agreements among private parties, and that there should be a strict separation between government's role as contractor and government's role as regulator. Although a "public and general" sovereign act that diminishes the value of a contract between private parties, or destroys an investment made pursuant to that contract, will only rarely result in a taking of property or a due process violation, such a sovereign act that has the effect of defeating a contract *with the government* may far more readily be held to violate the Fifth Amendment. This is particularly true where, as in the present case, the private parties have given the government the financial benefit it sought in exchange for the representations the government made in that contract. In such circumstances, far from crippling the government's ability to regulate for the public good, requiring just compensation for the private parties' bargained-for investment simply avoids a financial windfall to the government.[12]

Consequently, a finding that an action falls under the sovereign acts doctrine, or that the unmistakability doctrine precludes recovery for breach of contract, would not bar a claim under the Takings and Due Process Clauses of the Fifth Amendment. If it did, these doctrines of contract law would trump the Constitution itself. *See Stahel v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948) ("[T]he taking of property by the sovereign for public use, though unquestionably an act of

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[12] *Cf. Transcapital Financial Corp. v. OTS*, 44 F.3d 1023, 1025-26 (D.C. Cir. 1995) (observing that the court's earlier analysis in *Transohio Savings Bank v. OTS*, 967 F.2d 598 (D.C. Cir. 1992), which held that plaintiffs could not prevail on the merits of a takings claim for injunctive relief, did not preclude an award of *monetary* relief).

sovereignty, does not, under our Constitution, leave the sovereign immune from having to pay compensation for the taking. The Fifth Amendment expressly imposes liability."); *Wah Chang Corp. v. United States*, 282 F.2d 728, 734-36 (Ct. Cl. 1960) (concluding that the sovereign acts doctrine precluded recovery for breach of contract but finding that the sovereign act at issue nevertheless constituted a compensable taking of plaintiff's property).

It is true that, on occasion, this Court has appeared to invoke the unmistakability doctrine in the context of Fifth Amendment claims. *See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment* ("*POSSE*"), 477 U.S. 41 (1986); *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987). However, a close review of these cases indicates that the Court's disposition of the constitutional claims turned not on its application of the unmistakability rule to determine which party had assumed the risk of regulatory change, but rather on a determination that there was no property interest to protect and thus no Fifth Amendment violation to remedy. In *Posse*, for example, Congress had expressly reserved the right to change any provision of the agreements at issue. The Court concluded that the Government had not created any reasonable expectation in the States that the provision in question would remain unchanged, because the very agreements that were legislatively modified contained no indicia of *contract* rights, but were simply "part of a regulatory program" that Congress by statute had expressly "retained the authority to amend."[13]

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[13] The *POSSE* Court used several factors in determining that there was no property interest --- such as reasonable, investment-backed expectations -- arising from the agreements with the Government. First, the Court found that the contractual provision at issue "exactly tracked the language of the statute, conferring no right . . . beyond that contained in [the statute] itself." Second, the Court found the provision constituted "neither a debt of the United States, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium. Third, the Court found the

Similarly, *Cherokee Nation* involved construction of a treaty pursuant to which the Cherokee Tribe claimed that the federal government had conveyed away its navigational servitude. Noting that such an interpretation of the treaty would be "wholly extraordinary" under well-established law concerning the meaning of the federal servitude, the Court also observed that, in a prior case involving the same treaty, the Tribe had conceded that "nothing in the conveyance of title ... conflicts with the power of the Government [concerning] navigation." 480 U.S. at 706. In these circumstances, far from resolving the case using the unmistakability doctrine, the Court simply held that the Tribe's expectations (and any investments it had made) did not constitute a property right but were unilateral and unreasonable.[14]

As the *POSSE* Court recognized, a mere regulatory program does not confer property rights. *Cf. Fleming v. Nestor*, 363 U.S. 603, 611 (1959) (holding that the Social Security Act confers no

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"clause was not unique ... nor was it a term over which the State had any bargaining power or for which the State provided independent consideration." Fourth, as noted above, the Court found that the provision "simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare." Application of these *POSSE* factors to the thrifts' agreements as to the use supervisory goodwill to meet capital requirements -- which conferred a right beyond that contained in the general statutory scheme to which all thrifts were subject, which required thrift acquirors to assume certain liabilities, and which were granted as consideration over which the government had bargaining power -- indicates that the thrifts' investments made in reliance on those agreements constitute property within the protection of the Fifth Amendment.

[14] In some cases involving government contracts with private parties, the government has relied upon the unmistakability and sovereign acts doctrines in defending itself against Fifth Amendment claims. *See, e.g., Winstar Corp. v. United States*, 25 Cl. Ct. 541, 550 n.14 (1992) ("The government also asserts [the sovereign acts] doctrine as a defense to plaintiffs' taking claim."); *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 145 (1992) ("The Government argues that 'the sovereign act defense not only bars breach of contract claims, but also takings claims.'").

vested property interest in benefits which rises to the level of a contractual obligation on the part of the government). The government may enact regulations that readjust economic burdens and benefits in a manner rationally related to a legitimate public purpose, notwithstanding the incidental effects that such regulations have on those who expected the prior scheme to remain in place. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 444 (1982) (dictum) (applying a "rational relation" test to determine the constitutionality of generic changes in the law measuring the duration of causes of action).[15] A critical distinction exists, however, between regulation that affects the value of property held by a private party, and regulation that effects, even if incidentally rather than directly, an abrogation of a contractual right *with the government*. *Cf. Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (noting, in the contract impairments context, that "*[u]nless the State itself is a contracting party*, `[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure,'" but "*[w]hen the State is a party to the contract*, `complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake'") (emphasis added) (citations omitted).

The thrifts in this case cannot and need not rely on a right to have the government enforce regulations as they previously existed. They may, however, rely on specific agreements with or promises made by the government, which induced them to invest considerable sums in failing thrifts -- and which thereby saved the government the amount of that investment. A party to

[15] Given the holding in cases like *Fleming v. Nestor*, *amicf*'s Fifth Amendment claims are strengthened, not weakened, by the fact that the government promises they received came not from some piece of legislation extended generically to all thrifts or financial institutions, but rather through their bilateral dealings with governmental agencies.

such a contract with the government and those who invest in reasonable and foreseeable reliance on that contract have a legitimate expectation that cannot be abrogated by a mere regulatory change, and a regulatory interference with a contract right or even an implied promise can plainly lead to a Fifth Amendment violation, especially where the government received a benefit in exchange for that contract right.

The abrogation of a contractual obligation to refrain from enforcing more stringent capital requirements therefore has constitutional implications that would not exist in the case of a mere regulatory change. The fact that FIRREA and the stringent capital regulations might present mere regulatory changes for savings institutions *generally* does not mean that they are mere regulatory changes when evaluated with respect to each and every savings institution.[16] The violation of constitutional rights is determined by the effect of an action on, and the expectations of, an *individual* party, rather than by the effect on and expectations of all who might be generically affected by changes in law. An action may be a mere regulatory change to a group as a whole, and at the same time amount to a constitutional violation to those individual members of the same group from whom the government, by its targeted commitments, deliberately extracted private property.

(C) Congressional Authorization of Agency Action. The government argues with respect to the contract claims that, even if the agency promised respondents that they could use supervisory goodwill regardless of future legislation restricting them from doing so, this promise would be unenforceable

[16] Again, this fact should also lead the Court to accord special scrutiny to the government's sovereign acts defense, which rests essentially on the contention that by drafting FIRREA in a way that made the law on its face appear to be generally applicable to all thrifts, the government engaged in a "public and general" sovereign act that should release it from contractual liability.

because the agency lacked congressional authorization to make it. *See* Pet. Br. at 42 (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947), and *OPM v. Richmond*, 496 U.S. 414 (1990), cases in which the plaintiffs sought to "estop" the Government from rejecting misrepresentations made by its agents, for the proposition that a party relying on the authority of a government agency "may have his expectations disappointed" and assumes the risk of that the agency is acting outside the bounds of its authority).

Amici certainly do not contend that the relevant agencies had the authority to "contract away" the regulatory power of Congress, since not even Congress could do that. However, even if the agencies had purported to promise exemption from future regulatory changes in capital requirements, or had otherwise attempted to limit Congress's power to change the law, this would have no effect on the resolution of the thrifts' Fifth Amendment claims. This is apparent from the fact that just compensation is required even in those cases where a taking was in fact unauthorized by Congress.[17] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *id.* at 630 (Douglas, J., concurring) (because the taking of the nation's steel mills would require just compensation, the executive cannot properly effectuate it without congressional authorization); *see also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (holding that the self-executing nature of the Fifth Amendment requires just compensation once a taking is found, notwithstanding the absence of any voluntary

[17] In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether Congress authorized the taking or intended to permit recourse to a Tucker Act remedy, but whether Congress has withdrawn the Tucker Act grant of jurisdiction to the Court of Claims. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). Thus, the fact that a taking has not been authorized by Congress does not deprive the property owner of the right to recover just compensation.

decision by the sovereign to exercise its power of eminent domain).[18] The thrifts' due process claims would similarly not be defeated by a finding that the agencies involved lacked congressional authorization to make the representations they did to induce the investment in failing thrifts.[19]

[18] In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court found a taking of Kaiser Aetna's property (without relying on the concept of promissory estoppel) even though the government officials involved presumably were not authorized to make the representation, inferred by the Court from their silence, that Kaiser Aetna would have no duty to provide public access to its marina. *See* the discussion of this case in Point I *supra*.

[19] *See Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) (citing *Santobello v. New York*, 404 U.S. 257 (1971), and concluding that "fundamental fairness and public confidence in government officials require that prosecutors be held to `meticulous standards of both promise and performance'" even where the prosecutor making the promise lacks the authority to bind the particular agency whose action is being compelled) (citation omitted), *cert. denied*, 431 U.S. 911 (1977); *see id.* at 294, 296 n.16 (rejecting the applicability of contract law cases as "resting on totally different policy considerations than those which underlie plea bargaining in the criminal justice system"). *See also Correale v. United States*, 479 F.2d 944 (1st Cir. 1973) (defendant who pleaded guilty on the basis of an "illegal" recommendation -- one the prosecutor was forbidden by statute to offer -- was held entitled to specific performance of the plea bargain); *Geisser v. United States*, 513 F.2d 862, 863-64 (5th Cir. 1975) (in "a case of the great United States going back on its word in a plea bargain made by the Department of Justice," which promised that the defendant would not be deported and that she would not be confined for more than three years, the court rejected as "highly legalistic" the government's "weak justification that notwithstanding breaches of constitutional dimension [*i.e.*, the government's failure to grant the defendant parole and issuance of a warrant for her deportation], there is nothing that can be done about it since (I) the Government by extradition treaty ... is bound to deport [defendant] on demand and (ii) granting release is an unwarranted intrusion into the discretion of the Board [of Paroles] as an independent agency").

CONCLUSION

This Court should affirm the ruling below with respect to respondents' breach of contract claims and thereby avoid the need to confront, after a period of considerable delay, respondents' and *amici*'s meritorious Fifth Amendment due process and just compensation claims. In any event, this Court should not apply the unmistakability or sovereign acts doctrines, or resolve the question of agency authority, in a way that would defeat the separate Fifth Amendment claims of respondents or of *amici* and that would squarely conflict with the protection consistently accorded in takings and due process law to those reasonable expectations that the government induces in specific private parties in order to encourage them to invest resources for public benefit. Thus, even if this Court were to reverse the decision below as to the breach of contract issue, the Court should remand for disposition of the Fifth Amendment issues in this case.

Respectfully submitted.

LAURENCE H. TRIBE
Counsel of Record
BRIAN STUART KOUKOUTCHOS
MELANIE L. OXHORN
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

Of Counsel:

HARVEY SILVERGLATE
ANDREW GOOD
SILVERGLATE & GOOD
83 Atlantic Avenue
Boston, Massachusetts 02110
(617) 523-5933

JOHN C. MILLIAN
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500